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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 306

FORTNER ENTERPRISES, INC., - - Petitioner,

versus

UNITED STATES STEEL CORPORATION,
U. S. STEEL HOMES CREDIT CORPORATION, - - - - - - Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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STATEMENT.

Petitioner simplifies this Response by presenting three allied questions, none of which address themselves to the specific matters enumerated in this court's Rule 19. Of necessity then, the petition as presented, must fall within that language of this court's Rule 19 which points out that the enumerated reasons for granting the writ are "neither controlling nor fully" measure the court's discretion.

In discussing the three questions presented they must be reframed, since as presented in the abstract, they do not present the real questions. As to the facts

of the matter, we urge the court to avail itself of the District Court's lucid presentation, commencing at page 84 of Appendix A to the Petition. There is no real fact issue in the case. All transactions are evidenced by written documents. These documents speak for themselves. Other basic facts are not disputed.

At the risk of oversimplification, we find the real basis for the Petition (Petition, page 11), is that the District Court evaluated the evidence and then misapplied the law. Needless to say, we do not agree with opposing counsel's conclusion but even if so, this does not appear to be a proper basis for granting the writ, particularly when the decision of the District Court, thus critized, was affirmed *per curiam*.

RESPONSE TO REASON I FOR GRANTING THE WRIT.

The question as stated by Petitioner, asks the court to find that the decision was improper, in that a summary remedy should not have been granted when there was "ample evidence" to support the complaint. There is very little we can do with a question like this. Of course it is error for such to take place. What Petitioner is really telling the court is that its conclusion, that there was ample evidence in the record to support the complaint was not shared by the District and Circuit Courts. Following this question in the Petition is a lengthy argument which is repeated when Petitioner details Reasons II and III for granting the writ. Discussion here of Point I would be repetitious when the two remaining points are considered.

The District Court and the Sixth Circuit Court of Appeals, relying on Northern Pacific Railway Company v. United States, 365 U. S. 1, 2 L. Ed. 2nd 545 (1958), recognized that there must be two elements to constitute an illegal tie-in contract. The offending party must have economic power with respect to the tying product, such as to restrain competition for the tied product and a not-insubstantial amount of commerce must be affected. Reason II (Petition, page 20) deals with the tying product, which in this case is money and Reason III (Petition, page 26) treats the transaction's affect on commerce.

RESPONSE TO REASON II FOR GRANTING THE WRIT.

At the outset, we are faced with the question of whether or not money can be a tying product because of its scarcity. But in the instant case, this question is never reached since the record discloses, without contradiction, that there were ample funds available locally—not taking into account the availability of money in other financial centers, to finance the project (Affidavit of Dobbins, R. 275a). Conceding this point, Petitioner argues that the plan of using the money was unique and this is the basis for its presentation of Reason II. As the question is framed by Petitioner it concludes, as a premise, that in fact the plan was unique. The question does not raise the true issue. Petitioner fails to point out here and did not point out in the courts below why the plan was unique and why others were precluded from following the plan,

if they desired. The lower courts did not agree with Petitioner's conclusion simply because the plan was neither unique, nor unusual.

The essence of the plan is this. The Petitioner, having insufficient funds or credit, represented to the Respondents that it wished to borrow money to acquire land, then to borrow money to develop land and then to borrow money to buy Respondents' product. Respondents agreed to this but only on the condition that Petitioner would place its products on the land thus acquired and thus developed with Respondents' money, but the restriction lasts only while the debt was unpaid (Loan Agreement, R. 24a). The things that were not required are the key to this transaction. There was no requirement that Petitioner borrow money in order to purchase Respondents' products. If however, Petitioner was required to borrow money in order to buy Respondents' products there was no requirement that it borrow from Respondents. Finally, there is no requirement that Petitioner purchase any number of units from the Respondents, the Petition to the contrary notwithstanding (Dealer's Franchise, R. 34b). Should Petitioner repay the loan he does not lose the Dealer's Franchise, it requires nothing except payment for the products and other customary contractual provisions. There is nothing unique or unsual about the loan.

Absent from the case is the element of coercion. Corporate petitioner was dormant prior to the transaction and in fact was not even authorized to engage in the form of business here involved, until the day be-

fore the questioned contract was made (Affidavit of Rollins, R. 278a). Petitioner in the first instance was not compelled to do anything at all—it could have remained dormant. Or if it needed money its stockholders could have provided it or it could have borrowed elsewhere. All of this without prejudice to its purchase of the Home Packages (tied product) from Respondents.

RESPONSE TO REASON III FOR GRANTING THE WRIT.

Arguing on a dollar basis the Petitioner contends that there was a substantial affect on Interstate Commerce by reason of the transaction. This basis is not necessarily the proper one. Volume of dollars involved may or may not determine affect on commerce, Tampa Electric Company v. Nashville, 365 U. S. 320, 5 L. Ed. 2d 580 (1961). The relevant market area also has bearing on the issue. In the instant case, because of the limited geographical effect of the restriction the relevant market area, in reality, is almost the same as the share of the market concept Petitioner advocates. Respondents' market area is so large the District Court approached the matter from a local (Jefferson County, Kentucky) standpoint. He noted correctly that the so-called restrictive contracts affected only .00032% of the available area in Jefferson County, Kentucky (Affidavit of Harb, R. 276a, Affidavit of Rollins, R. 278a). The questioned restrictive agreements do not prohibit Petitioner from dealing with others and (Petitioner to the contrary notwithstanding) it is not required to

purchase anything. The end result of the so-called restriction is to deny that exceedingly small portion of Jefferson County, Kentucky, purchased and improved with Respondents' funds, from being developed other than with Respondents' products BUT only while the debt is outstanding. And even while the debt remains unpaid Petitioner may develop the balance of the county, deal and make similar transactions with Respondents' competitors and otherwise freely transact business. Because there is no requirement to purchase and only a small area is affected, and that only while the debt is outstanding, the effect on competition is remote rather than substantial.

THE *PARI DELICTO* QUESTION.

Throughout the petition for the writ and specifically at its conclusion, Petitioner makes reference to and strongly argues that this court accept the case on the strength of Perma Life Mufflers, Inc., et al. v. International Parts, et al., decided by this court June 10, 1968 (Citation not available). Apparently Petitioner does so because this recent case, which does away with the defense of *pari delicto,* was not decided when the Sixth Circuit reviewed the decision of the District Court. Petitioner incorrectly goes on to state that the Respondents argued the defense of *pari delicto* and that the District Court and the Circuit Court relied on that argument. This simply is not true. The Respondents, in the District Court, on June 10, 1966, attempted to amend their answer, setting up the defense of *pari*

delicto. The District Court however entered the following order and that was the end of the matter, once and for all (See page 44, Appendix A).

> "Defendant's tender of an amended answer setting up a Fourth Defense, that of pari delicto, served by mail on plaintiff's attorney June 10, 1966, comes too late and this amended answer will not be permitted to be filed."

CONCLUSION.

There appears to be no valid reason to grant a writ of certiorari when, except for this court's admitted discretion, the case does not fall within the specifically enumerated reasons for review.

Respectfully submitted,

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